IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.254 OF 2006

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Asian Electronics Ltd. ...Petitioner

v/s.

Tata Motors Limited ...Respondent

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Mr.Ketan Parikh with mr.Jitendra Jain, Mrs.Shamima Taly, Mr.Sagar Kadam i/b S. Mohomedbhai & Co. for the Petitioner.

Mr.P.K.Samdani with Mr.Sunil Purohit, Mr.Sandeep Bhimekar and Ms.Karishama Vora i/b Wadia Ghandhy & Co. for the Respondent.

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CORAM: D.K.DESHMUKH, J.

DATED: 28TH NOVEMBER,2006

P.C.:

1. This petition is filed under Section 34 of the Arbitration & Conciliation Act challenging the award made by the sole-arbitrator dated 23rd March, 2006 directing the Petitioner to pay to the Respondent an amount of Rs.2,00,65,563/- with interest from the date of the award till realisation. The Petitioner is a Public Limited Company and carries on business of manufacturing energy savings devices electrical equipments etc. The Respondent is also incorporated under the Companies Act which carries on business of hire-purchase and leasing of electrical equipment, machinery etc. Sometime in the year 1996 the Petitioner approached the Respondent and sought sanction of lease facility. The Petitioners is manufacturer of automatic load monitoring system and were desirous of selling those equipments and taking back the same on lease for a duration of five years. It appears that the parties were under the impression that in case the equipments are leased then the Petitioner would be entitled to 100% depreciation in the financial year in which they were installed and

put to use. The Petitioners had made arrangements with Andhra Pradesh State Electricity Board for sub-lease of the equipments. The Respondent agreed to purchase 33 equipments for a total consideration of Rs.5,04,90,000/- and also agreed to lease out the same to the Petitioner. The Petitioner accordingly raised a proforma invoice dated 20th September, 1996 and final invoice dated 26th September, 1996. Prior to this date on 12th September, 1996 the Board of Directors of the Petitioner has passed a resolution to take on lease the equipments from the Respondent. The Respondent by letter dated 19th September, 1996 sanctioned lease of the equipments to the Petitioner. In pursuance of the invoice the Petitioner was paid a sum of Rs.5,04,90,000/- being purchase price of the equipments on 20th September, 1996. In furtherance of the agreement between the parties on 25th September, 1996 an agreement of lease in respect of the equipments was entered into. The Petitioner also executed the supplementary lease schedule and lease summary schedule and which are treated as a part of the agreement of lease. By the agreement the lease rental was fixed payable from 27th September, 1996 till 26th September, 2001. Clause 17 of the agreement between the parties provided that if it is

found that the lessor is not entitled to claim depreciation on the lease equipment then, in any event during the term of the deed the lessor is required to pay income tax at a higher or a lower rate than 43%, the rental will stand increased/ decreased. There are other details also contained in the agreement. The equipments were sub-leased by the Petitioner and were used from September 27, 1996 and therefore the Respondent became entitled to claim depreciation for the year ending March 31, 1997. The Respondent sought depreciation in the Income-tax returns filed for the assessment year 1991-98 at 100% in terms of the provisions of Income Tax Rules. By order dated 31st March, 2000 the Income-tax Officer disallowed the depreciation on the ground that the agreement between the parties did not reflect the true nature of transaction between the parties. The Respondent has filed an appeal against that order which is pending. As the depreciation was not allowed by the Income-tax department, the Respondent claimed increase in the lease rental charges as per clause 17.

2. On that claim being made, disputes arose between the parties. In the agreement between the parties

there was an arbitration clause. That arbitration clause was invoked and Hon'ble Mr.Justice M.L.Pendse (Retd.) was appointed as a sole arbitrator.

3. Parties appeared before the sole arbtirator. Produced the documents. Oral evidence was led by the Petitioner. On the basis of material produced before the learned arbitrator, the learned arbitrator has made the award dated 23rd March, 2006. The learned arbitrator has held that the Respondent are entitled to increase in the amount of lease rental as depreciation has been disallowed. The learned arbitrator has also directed that in case the order passed by the Income-tax Officer disallowing depreciation is set aside in appeal, the Petitioner will be entitled to refund of money paid pursuant to the paragraph (A) of the award.

4. The learned Counsel appearing for the Respondent at the out set has made two statements, (i) that as clause (B) of the operative part of the award comes into play on a decision by the higher authority of the income-tax department, the Respondent is under a duty to keep the Petitioner informed about the development that takes in the proceedings that are

pending before the Income-tax authorities; and (ii) that in case the Respondent is required to refund the amount as directed by paragraph B of the operative part of the award, the amount will be refunded with interest at the rate of 18% p.a.

5. The award is challenged by the Petitioner on several grounds. The first ground on which the award is challenged is that the claim made by the Respondent was pre-mature. According to the learned Counsel, the order of the income-tax officer disallowing the depreciation has not become final, in as much as, the appeal against that order is still pending. According to the learned Counsel till the order disallowing the depreciation attains finality, the Respondent cannot claim increase in the lease rental. In my opinion, this submission has no substance. in my opinion, the Respondent is fully justified in making a claim pursuant to Clause 17 of the contract between the parties after the order was made by the income-tax officer. As the challenge to that order is pending, the arbitrator has provided for that eventuality in paragraph B of the operative part of the award. In my opinion, therefore, it cannot be said that any prejudice is caused to the

interest of the Petitioner because of invocation of Clause 17 by the Respondent after the order was made by the income-tax authorities. The second ground on which the award is challenged is that the real nature of the transaction between the parties was not that the equipment was given on lease by the Respondent to the Petitioner. According to the learned Counsel the real nature of transaction was that it was a finance transaction between the parties. The learned arbitrator has dealt with this aspect of the matter in detail. I do not find any fault with the reasoning that has been given by the learned arbitrator for rejecting this submission. In my opinion, what is pertinent is that if according to the Petitioner the real nature of the transaction is not reflected in the agreement and the real nature of the transaction was not a lease transaction, it was for the Petitioner to spell out in detail what was the real nature of the transaction between the parties. The Petitioner is a Corporation, obviously, therefore, the real nature of the transaction must have been discussed in the notes and files and internal correspondence between the various officers of the Petitioner. But no such evidence is produced before the learned arbitrator. In the pleadings also

one does not find that the Petitioner has spelt out in detail what was the real nature of the transaction between the parties. The next significant aspect that is to be noted is that admittedly in the Books of Account maintained by the Petitioner, the Petitioner is not shown as the owner of the equipment after the date of its sale to the Respondent and the Books of account also show that the Respondent is receiving rental from the Petitioner. If according to the Petitioner, the real nature of the transaction was not sale of the equipment and lease of the equipment, then the Books of Account of the Petitioner would not have reflected this nature of the transaction. Even in the income-tax returns filed by the Respondent, admittedly, the same nature of the transaction is reflected and not that nature of the transaction which according to the Petitioner is a real nature of the transaction. The submission, therefore, has no substance.

6. Third submission that is made is that the ground raised by grounds (o) (r), (s), (u), (w) & (z) of the petition though specifically urged before the learned arbitrator, have not been considered by the learned arbitrator. Perusal of ground (o) shows that

according to the Petitioner the learned arbitrator has not referred to several aspects which were referred to by the Petitioner for contending that the real nature of the transaction was a finance transaction. In my opinion, on the basis of the reasons which have been given by the learned arbitrator in the award, which in my opinion are good reasons, the learned arbitrator has reached the conclusion that the Petitioner is not justified in saying that the nature of the transaction reflected in the agreement is not the real nature of the transaction, then only because some of the submissions are not considered by the learned arbtirator will not vitiate the award. I have already indicated above that the conduct of the Petitioner as reflected in books of account and income-tax returns itself shows what was the real nature of the transaction. Perusal of grounds (r) shows that according to the Petitioner Clause 17 of the lease agreement under which the claim was made was vague, however, that argument has not been considered by the learned arbitrator. Perusal of the award, however, shows that the learned arbitrator has considered the question as to what is the interpretation to be placed on clause 17 of the

agreement between the parties. The learned arbitrator has held that the real intention behind clause 17 is that in case the income-tax authorities disallowed depreciation on the equipments to the Respondent, then the Respondent would be entitled to increase in the lease rental so that he is brought in the same position that he would have been had the agreement not been entered into on the assumption that 100% depreciation would be allowed. In my opinion, interpretation put on clause 17 by the learned arbitrtor is the only interpretation that can be placed on that clause. So far as ground (s) is concerned, the Petitioner urged that the learned arbitrator has committed an error in holding that issue no.7 does not survive for consideration. Issue No.7 is whether the Respondent was aware of the contract between the parties and the Andhra Pradesh Electricity Board. The learned arbitrator has held that that contract was relevant only because the claimant was claiming redelivery of the equipment. But the claimant has given up his prayer for delivery of the equipments and therefore, according to the learned arbitrator issue No.7 was not relevant. I do not find in ground (s) any reason given by the Petitioner as to how the transaction between the

Petitioner and the Andhra Pradesh Electricity Board was relevant for any purpose other than the prayer of the Respondent for return of the equipments. So far as ground (w) is concerned, according to the Petitioner, submission made on behalf of the Petitioner in relation to the interpretation on Clause 17 by the Petitioner has been ignored by the learned arbitrator. It is also urged in ground (w) that clause 17 applies only in relation to the eligibility of the equipment and disallowance of depreciation of the equipment, it does not relate to liability of the Respondent to claim depreciation. Perusal of the award, however, shows that the learned arbitrator has considered clause 17 in detail and bare reading of clause 17 shows that it relates to liability of the lessor to claim depreciation in relation to the equipment. I do not find that there is any infirmity in the award in that regard. So far as ground (z) is concerned, there the Petitioner urged that the learned arbitrator has not clearly indicated as to why he has accepted the calculation for arriving at the lease rental in the chart submitted by the Respondent. Perusal of the award, however, shows that the learned arbitrator has accepted the basic submission made on behalf of the

Petitioner that the increase in the lease rental is to be decided on the footing that had the parties not been under the impression that 100% depreciation will be allowed under the Income-tax Act, what would have been the amount of lease rental that the parties would have agreed in the facts and circumstances of the case. The learned arbitrator has given detail reasons for arriving at the amount. I do not find any fault in the award in this behalf.

7. The fourth ground on which the award is challenged is that there is no evidence on record to support the findings that are recorded by the learned arbitrator. The learned Counsel for the Petitioner submits that the submissions to that effect are to be found in grounds (u), (v) , (x) & (w). Perusal of ground (u) shows that according to the Petitioner, the learned arbitrator has not indicated as to how the benefit of reduction in interest rate was passed on by the Respondent to the Petitioner. Perusal of the chart submitted with the statement of claim shows that there are details given in that chart as to how from time to time benefit of reduction in interest rate was passed on by the Respondent to the Petitioner. Perusal of the deposition of the witness

examined on behalf of the Petitioner shows that the correctness of that chart has been accepted by the Petitioner. So far as ground (v) is concerned, principal submission of the Petitioner appears to be that the Respondent has established that the parties entered into the agreement, specially parties agreed to clause 17 on the assumption that 100% depreciation would be allowed. So far this ground is concerned, there is material available on record to indicate as to on what basis the amount of lease rental was arrived at. So far as ground (x) is concerned, it also relates to acceptance of the chart by the learned arbitrator for arriving at the figure of monthly lease rental. I find from the award that there are reasons given in detail by the learned arbitrator, based on the material produced on record for accepting the chart ultimately submitted by the Respondent in the arbitration proceedings. Ground (z) also relates to the working out of the increase in the rate of interest. In my opinion, there is enough material available on record to arrive at the rent which has been fixed by the learned arbitrator. Same is the case with ground (aa). There are charts through which I was taken by the learned counsel appearing for the Respondent to show what was the

methodology for arriving at the amount of monthly rent. I am satisfied that there is no error committed by the learned arbitrator in arriving at the amount of rental.

8. The fifth ground on which the award is challenged is that the finding recorded by the learned arbitrator that in view of their conduct the Petitioner cannot claim that the real nature of the transaction was not the lease transaction but the real nature of the transaction was finance transaction is wrong. I have already observed above that the learned arbitrator has rightly held that the real nature of the transaction between the parties was lease and it is more than clear from the conduct of the Petitioner.

9. The sixth ground on which the award is challenged is that the finding recorded by the learned arbitrator regarding identity of the equipment is not correct. In my opinion, the arbitrator was justified in recording that finding. If one considers the dates of the agreements between the parties and the Andhra Pradesh Electricity Board and the lease agreement between the Petitioner and the Respondent,

the lease agreement between the Petitioner and the Andhra Pradesh Electricity Board was of 18-4-1996 and the next agreement was of 18-8-1997, the lease transaction was entered into between the Petitioner and the Respondent on 25-3-1997 and 25-9-1997. Thus, the lease transaction between the Petitioner and the Respondent was after the first agreement between the Petitioner and Andra Pradesh Electricity Board and before the second agreement between the Petitioner and Andhra Pradesh Electricity Board. Therefore, the learned arbitrator has rightly found that the identity of the equipment which was leased out to Andhra Pradesh Electricity Board cannot be established.

10. The seventh ground on which the award is challenged is that the claim made by the Respondent was barred by the law of limitation. According to the learned Counsel reference was made after the income-tax officer made the order on 31st March, 2000 and the amount of lease rental due from 27th September 1996 onwards were claimed. I find that the learned arbitrator has correctly held that the cause of action arose when the Income-tax Officer disallowed the depreciation and the Respondent would

be entitled to claim lease rental from the year 1996. Admittedly, no interest has been claimed on that amount. I, therefore, do not find any infirmity in the finding recorded by the learned arbitrator on this count.

11. The last ground on which the award is challenged is that the learned arbitrator has awarded 18% interest and that is excessive. The learned arbitrator has awarded interest only from the date of the award till the date of realisation. Even if the arbitrator had not fixed the rate of interest, the Respondent would be entitled to that rate of interest under the Act. The Respondent has also agreed to pay to the Petitioner, in case the Petitioner becomes entitled to the refund of the amount under paragraph (B) of the operative part of the award, interest at the same rate. Therefore, in my opinion, no fault can be found with the rate of interest that is awarded by the learned arbitrator. This is the Petition filed under Section 34 of the Act. Section 34 confers a very restricted and limited power on the court to interfere with the award made by the arbitrator. I find that so far as the award is concerned, it is an award giving eleborate reasons

for the findings that have been recorded by the learned arbitrator. Therefore, merely because on some aspect it is possible to reach some other conclusion that have been reached by the learned arbitrator, the court will not be justified in interfering with the award.

12. After having gone through the award, material available on record and after having heard the learned counsel for both sides, I find that on the basis of material produced on record, the finding recorded by the learned arbitrator are findings that are possible to be recorded. In other words, it cannot be said that considering the material available on record it is impossible for anybody to reach those findings. The scope of the jurisdiction of the court hearing petition under Section 34 is that it can interfere with the award if the court finds that the findings that have been recorded by the arbitrator are impossible to be reached on the basis of material available on record. Looking at the matter from that point of view, in my opinion, the award cannot be interfered with. The petition,therefore, fails and is dismissed. The Petitioner is directed to pay costs of this petition

to the Respondent as incurred by the Respondent.

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